

Supreme Court, U. S.  
FILED

JUL 21 1977

MICHAEL HODAK, JR., CLERK

---

**Supreme Court of the United States.**

**77 - 113**

No. 77 -

IN RE: CHARLES BERNARD MEAD,  
PETITIONER.

ON APPEAL FROM A JUDGMENT OF THE MASSACHUSETTS  
SUPREME JUDICIAL COURT.

**Petition for a Writ of Certiorari to the  
Massachusetts Supreme Judicial Court.**

CHARLES BERNARD MEAD,  
Box 369,  
Ashland, New Hampshire 03217.  
(603) 968-4458  
Petitioner, Pro se.

## Table of Contents.

Opinions below	1
Jurisdiction	2
Question presented	2
Constitutional provision involved	2
Statement of the case	3
How Federal questions were presented	5
Reasons for granting the Writ	6
I The court below has equated the due process rights of an applicant for an occupational license with the right to reexamination. In doing so that court has undertaken to define and severely restrict said rights in a manner inconsistent with the previous rulings of this court	6
II The various circuit court decisions cited in the opinion have considered due process rights of candidates only as an ancillary issue. Two of these decisions by the Fifth and Seventh Circuits respectively stand, in part, for the premise that due process is satisfied by the right to reexamination. These cases are however, readily distinguishable from that of petitioner and in reality support his position. A Fourth Circuit case which was considered by the court but <i>not cited</i> in its opinion refutes unequivocally the equating of reexamination and due process. The Ninth Circuit has expressed the view that denial of admission to the bar is reachable solely through petition for certiorari to the United States Supreme Court from a state supreme court decision	7

III	There is a lack of uniformity in applicable state court decisions and in state standards as to admission, testing and review procedures. Significantly, there is no state decision supporting the conclusion reached below that is not readily distinguishable from petitioner's due process claim	11
IV	The administrative burden argument in the opinion ill serves both the applicant and the public. The court below has ignored the obvious and misstated the facts. The decision creates a <i>de facto</i> state of law that is inimical to both due process and equal protection rights of future applicants	14
	Conclusion	17
Appendix A	Order and judgment, Supreme Judicial Court, Suffolk, SS. No. 76-221 Civil	19
Appendix B	Opinion and Judgment of the Supreme Judicial Court for the Commonwealth	20
Appendix C	Notice of denial of request for rehearing by the Supreme Judicial Court for the Commonwealth	25
Appendix D	Order for Entry of Judgment by the Supreme Judicial Court for Suffolk County in accordance with rescript	26

#### Table of Authorities Cited.

##### CASES.

Application of Peterson, 459 P. 2d 703 (Alaska 1969)	12
Chaney v. State Bar of California, 386 F. 2d 962 (9th Cir. 1967)	11

Charles Bernard Mead, Petitioner, Mass. Adv. Sh. (1977) 599	1-2, 5-17, 20-24
Davidson v. New York State Board of Law Examiners, 382 N.Y.S. 2d 418 (1976)	11, 12
In Re Monaghan, 225 A. 2d 387 (Vt. 1967)	13
Petition of DeOrsey, 112 R.I. 536, 312 A. 2d 720 (1973)	13
Pettit v. Gingerich, 45 U.S.L.W. 2421 (Feb. 1977)	6, 7
Richardson v. McFadden, 540 F. 2d 744 (4th Cir. 1976)	9, 10, 11
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)	6
Tyler v. Vickery, 517 F. 2d 1089 (5th Cir. 1975)	7, 8
Whitfield v. Illinois Board of Law Examiners, 504 F. 2d 474 (7th Cir. 1974)	8

##### CONSTITUTIONAL PROVISION AND STATUTES.

United State Constitution	
Fourteenth Amendment	2, 6, 9, 16
28 U.S.C. § 1257(3)	2
Civil Rights Act	11

##### MISCELLANEOUS.

43 The Bar Examiner 72 (1974)	14
1 Davis, K.C., Administrative Law (1958)	11
Massachusetts Supreme Judicial Court General Rules 3:01(5)	5

# Supreme Court of the United States.

No. 77 -

---

IN RE: CHARLES BERNARD MEAD,  
PETITIONER.

---

ON APPEAL FROM A JUDGMENT OF THE MASSACHUSETTS  
SUPREME JUDICIAL COURT.

---

**Petition for a Writ of Certiorari to the  
Massachusetts Supreme Judicial Court.**

---

The petitioner, Charles Bernard Mead, who appears pro se, respectfully prays that a writ of certiorari issue to review the judgment of the Massachusetts Supreme Judicial Court entered in Case No. 761.

## **Opinions Below.**

The case was originally heard August 4, 1976 by Mr. Justice Braucher, presiding as a single justice of the Court, Case No. 76-221 Civil. Relief was denied on that same date without opinion. A copy of that judgment appears in Appendix A hereto. A timely appeal was taken to the full bench of the court.

The opinion of the Massachusetts Supreme Judicial Court, *Charles Bernard Mead, Petitioner*, Mass. Adv.



Sh. (1977) 599, with copy of order affirming the judgment initially appealed from appear in Appendix B hereto. Petitioner made a timely motion for rehearing to the court below which was considered, and denied April 27, 1977. A copy of the denial appears in Appendix C hereto.

#### **Jurisdiction.**

The order for entry of judgment by Mr. Justice Wilkins of the Supreme Judicial Court for Suffolk County was made on May 11, 1977, and appears as Appendix D hereto. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

#### **Question Presented.**

What is the extent of due process rights accruing to a qualified applicant in the examination of his professional competence by a State to determine his eligibility to practice law?

#### **Constitutional Provision Involved.**

##### **UNITED STATES CONSTITUTION, AMENDMENT 14.**

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### **Statement of the Case.**

Petitioner was graduated from Northeastern University School of Law, Boston, Massachusetts on January 5, 1976 and upon proper application sat for the bar examination in Massachusetts February 25 and 26, 1976.

Since July 1974 the bar examination as administered in Massachusetts has been divided into two separate and distinct parts. The first part is the Multistate Bar Examination (MBE), which consists of 200 highly refined multiple choice questions designed to accurately measure an applicant's knowledge of substantive law. The MBE is structured and administered by the National Conference of Bar Examiners (NCBE) in conjunction with the Educational Testing Service (ETS).

The MBE has been standardized to an extent that enables ETS to provide the examiners with a scaled score as well as a raw score. The purpose of converting to a scale is to make reported scores as independent as possible of a particular form of a test an examinee has taken and the composition of the candidate group at a particular administration. Massachusetts utilizes the raw score rather than the scaled score. The MBE portion of the test is machine scored.

The second portion of the examination is based on ten essay questions drafted by the Massachusetts Board of Bar Examiners (Board) and graded by the examiners and/or their readers. The essay questions are intended to elicit a candidate's competence to visibly demonstrate a logical analysis of facts, application of legal principles, and development of lawyer-like conclusions.

To combine these scores the Board converts the raw score on the MBE to an equivalent essay score by use of the "equi-percentile method." This method computes the percentiles of all the raw scores of the MBE part

and the percentiles of all the scores of the essay part separately. The MBE score in any given percentile so computed is translated to the essay score which occupies the same percentile in the essay computation. To obtain a final score, the translated or "converted" MBE score is added to the score the applicant receives on the essay part which total is then divided by two, allegedly giving the desired equal weight to each part of the examination.

The passing score as established by the Board is 50%. Petitioner received a raw score of 136 (142 scaled) on the MBE giving him a national raw score percentile rating of 67. Using the procedure outlined above this score converted to an equivalent essay score of 54.8%. The score assigned to petitioner's essays was 40%. While the Board and the court below have denied the petitioner's motion for *Order to Produce* what information petitioner has been able to gather indicates the essay score assigned to him to be at the 10 to 15 percentile level.

The combined average of petitioner's scores computes to 47.4% which is six-tenths of a point below an arbitrary average of 48%, the minimum combined score at which the Board will automatically review the essay portion of the examination for possible grading errors. This percentage score mandating review has not been altered since the MBE was adopted in Massachusetts in 1974, nor has it been altered in at least the last 50 years.

Massachusetts publishes the questions used in any given examination and for a modest fee will provide applicants with copies of answers as written by them on their original examination. No challenge of any kind is allowed to the decision of the Board.

Through correspondence petitioner brought to the attention of the Board the exceptionally wide disparity in his assigned scores and requested the Board, in the

sound exercise of its discretion, to reread the essay portion of his examination and to at least recount the credits assigned thereto. The request was denied.

By further timely action petitioner obtained a copy of his essay answers and carefully compared them with "model answers" published by a Boston attorney as part of a commercial enterprise. Finding a significant correlation of thought and expression between his own and these "model answers," petitioner engaged the services of said attorney to carefully and objectively, "marking hard," evaluate petitioner's essay answers. The results of this marking along with the grader's comments and "model answers" were submitted to the court below as exhibits. The opinion below acknowledges this evaluation as having concluded that petitioner's average scores, MBE and essay combined, were well over the passing grade of fifty percent.

Petitioner in appropriate fashion had previously brought these additional facts and exhibits to the attention of the Board and again requested that his essays be reread. When the request was again denied, petitioner initiated the action from which further review is now sought.

#### How Federal Questions Were Presented.

Under the facts of the case as stated above and in accordance with General Rules 3:01(5) of the court below petition to that court was made for a hearing. In conjunction with said action petitioner sought a motion for *Order to Produce* that included such items as model answers to essay questions, and various statistical information which he established as necessary through an expert at ETS to prove his contentions.

The hearing before a single justice was essentially a hearing to determine if a hearing would be granted. The



due process issue was raised at oral argument. No legal memorandum or brief was written.

After denial, timely notice of appeal was given and the case fully briefed and argued. The due process issue was treated in depth by both petitioner and respondent board through brief and at oral argument. Due process considerations are dispositive of the issue in the opinion of the court below, Appendix B.

### Reasons for Granting the Writ.

I THE DECISION BELOW HAS EQUATED THE DUE PROCESS RIGHTS OF AN APPLICANT FOR AN OCCUPATIONAL LICENSE WITH THE RIGHT TO REEXAMINATION. IN DOING SO THAT COURT HAS UNDERTAKEN TO DEFINE AND SEVERELY RESTRICT SAID RIGHTS IN A MANNER INCONSISTENT WITH THE PREVIOUS RULINGS OF THIS COURT.

In *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957), This Honorable Court stated at 238: "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment," a statement to which a footnote (5) was appended as follows: "We need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons."

Petitioner has never challenged the right of the State to test his qualifications nor has he raised any type of equal protection argument. In its initial treatment of the due process issue, the court has relied on the district court for Maryland decision in the case of *Pettit v. Gingerich*, 45 U.S.L.W. 2421 (Feb. 1977). *Pettit* is an

equal protection case dealing with alleged racial discrimination in the Maryland bar examination. It sustains the right of the State to administer said examination and to establish a reasonable passing score. *Pettit* is inapposite as an applicable federal precedent. In no way does *Pettit* address itself to the question of what constitutes due process in the administration of the bar examination, its grading, evaluation or review. Subsequent cases cited in the opinion below, both federal and state, do not support the conclusions reached by the court.

II THE VARIOUS CIRCUIT COURT DECISIONS CITED IN THE OPINION HAVE CONSIDERED DUE PROCESS RIGHTS OF CANDIDATES ONLY AS AN ANCILLARY ISSUE. TWO OF THESE DECISIONS BY THE FIFTH AND SEVENTH CIRCUITS RESPECTIVELY STAND, IN PART, FOR THE PREMISE THAT DUE PROCESS IS SATISFIED BY THE RIGHT TO REEXAMINATION. THESE CASES ARE HOWEVER, READILY DISTINGUISHABLE FROM THAT OF PETITIONER, AND IN REALITY SUPPORT HIS POSITION. A FOURTH CIRCUIT CASE WHICH WAS CONSIDERED BY THE COURT BUT *Not Cited* IN ITS OPINION REFUTES UNEQUIVOCALLY THE EQUATING OF REEXAMINATION AND DUE PROCESS. THE NINTH CIRCUIT HAS EXPRESSED THE VIEW THAT DENIAL OF ADMISSIONS TO THE BAR IS REACHABLE SOLELY THROUGH PETITION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT FROM A STATE SUPREME COURT DECISION.

*Tyler v. Vickery*, 517 F. 2d 1089 (5th Cir. 1975), was relied on by the Board and cited by the court in its opinion. *Tyler* was a class action alleging intentional racial discrimination against 40 unsuccessful black applicants for the Georgia bar. *Tyler* does in part, stand for the proposition that opportunity for retesting provides adequate due process safeguards. However, in affirming the Sum-

mary Judgment against the plaintiffs the Fifth Circuit noted that the District Court had properly considered the fact that 39 of the 40 plaintiffs had failed the MBE machine scored portion of the test. The dictum of *Tyler* at 1094, 1095 raises a strong inference that a different result would have appended had MBE scores provided a basis for a contrary conclusion such as exists in petitioner's case.

Another case relied on by the Board and cited in the opinion was a decision by the Seventh Circuit which also endorsed the concept that reexamination satisfies due process, *Whitfield v. Illinois Board of Law Examiners*, 504 F. 2d 474 (7th Cir. 1974), at 478. This too, however, must be read in light of the entire opinion. In *Whitfield* the court had previously stated, at 477, that the plaintiff had failed to make any substantive allegations that defendants had acted arbitrarily in grading his examination. The court went on to recognize "There may very well be situations in which a capricious denial by state officials may give rise to a federal remedy." *Whitfield, supra*, at 477. It should be noted that in his reply brief petitioner concisely summarized seven specific instances of abuse of discretion by the Board, all of which had been developed in his arguments. The most significant abuse is minimizing the *standardized* information which the MBE provides in establishing review criteria. In doing so the Board is *unfair to both the applicant and the public*. This is a policy that perpetuates rather than reduces the inherent error existent in the grading of any essay examination covering a broad spectrum of complex subject matter.

As argued below the public interest demands that where the objective portion of the examination supports a contrary result, marginally passing essays must be reviewed as well as allegedly failing essays before a *final*

*grade* is assigned. It is totally naive to think that essay questions can be graded with pin point precision. In brief and at argument this was demonstrated by reference to a nationally recognized treatise. This factor is particularly true in Massachusetts where it was further demonstrated to the court that the Board does not even prepare pro forma model answers before administering the essay questions. The argument was not refuted by the board nor inquired into by the court. *It should go without saying that no essay question should appear on an examination until the examiners, among themselves, have attempted to formulate an answer under simulated test conditions.*

Also considered below but *not cited* in the opinion was *Richardson v. McFadden*, 540 F. 2d 744 (4th Cir. 1976). In *Richardson* plaintiffs' sought declaratory and injunctive relief from rulings of the South Carolina Board of Bar Examiners. *Richardson* is the only circuit court decision that has faced a due process question similar to the one raised by the petitioner. South Carolina like Massachusetts did provide a review of examination papers determined by the Board to be "borderline." Also like Massachusetts it allowed no challenge to the decision of the Board as to what was reviewable or to the disposition of the papers which were reviewed.

The Fourth Circuit held that as to two of the plaintiffs, the Bar Examiners had acted arbitrarily and capriciously [in the manner of reconsidering their borderline scores] in violation of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Upon remand the district court was directed to certify these two plaintiffs as having passed the South Carolina bar. *Richardson, supra*, at 751, 752.

The Court then went on to consider the Bar Examiners' appeal from the refusal of the district court to



dismiss appellants' claim that lack of an established process for *challenging* examination results violated due process. Noting first that they could not determine on the record if adequate review had been available to the plaintiffs, the Circuit Court concluded that the due process claim was properly deferred pending outcome of this issue which at that point had been stayed by the South Carolina Supreme Court. The Circuit Court further observed at 752:

"As a second argument, the Examiners contend that no review procedure was necessitated because the right of reexamination satisfied the requirements of due process. See *Tyler*, supra, at 1103-05; *Whitfield v. Illinois Board of Law Examiners*, 504 F. 2d 474 (7th Cir. 1974).\* . . .

"To our knowledge, a person is not required by any state to repeatedly demonstrate his competence to practice law. The rule is: once is enough. And the reason for the rule is that it takes work, effort, and, nowadays, money to prepare for a bar examination. Moreover, the license is deemed of sufficient value that delay in getting it is an injury.

"It is true that some courts have held that reexamination is a more effective remedy than review because the administrative burden of allowing challenges was perceived to be too great.\* We are not persuaded.\*

The opinion below states "that the board provided a rereading for any apparently failing applicant who scored within two full points below the passing grade." At 602, Appendix p. 22. As in *Richardson*, supra, this in effect is no review where the candidate is denied opportunity to be heard by the Board. It is even more

\* Footnotes deleted.

egregious under such a system for the Board to refuse to exercise its discretion in reviewing *contradictory* results. No justification has been advanced for the blind faith such a policy accords the readers and/or the Board in their grading efforts.

To buttress its opinion the court below cited a 19 year old treatise of Professor Davis to the effect that reexamination was speedier and more accurate. The latter concept is nothing but rank speculation, and as noted in *Richardson*, supra, the former does not take into account the burdens and property rights recognized by today's constitutional standards.

In point of fact, the Federal Courts have reached the due process issue in virtually all of these cases only as an ancillary question. The reasons for this are well stated in *Chaney v. State Bar of California*, 386 F. 2d 962 (9th Cir. 1967), also relied on by the Board and cited in the opinion. *Chaney* was an action brought under the Civil Rights Act. The Ninth Circuit stated, at 967, that it was doubtful whether denial of admission to the bar is at all subject to remedy under the Civil Rights Act or whether it is reachable solely through petition for certiorari to the United States Supreme Court from the ruling of a state supreme court.

III. THERE IS A LACK OF UNIFORMITY IN APPLICABLE STATE COURT DECISIONS AND IN STATE STANDARDS AS TO ADMISSION, TESTING AND REVIEW PROCEDURES. SIGNIFICANTLY, THERE IS NO STATE DECISION SUPPORTING THE CONCLUSION REACHED BELOW THAT IS NOT READILY DISTINGUISHABLE FROM PETITIONER'S DUE PROCESS CLAIM.

The Board cited *Davidson v. New York State Board of Law Examiners*, 382 N.Y.S. 2d 418 (1976), to refute a proposition that had not even been suggested by petitioner i.e., that the court itself should regrade his es-

says. The opinion below did not rely on *Davidson*. This is unfortunate, had either the Board or the court adopted the teaching of *Davidson* as to due process considerations this petition would simply have never existed.

“Established procedures provide for review by the full board of all failed candidates’ papers which fall within ten percentiles below the pass mark. Failed candidates, after inspection of their examination papers, the examination questions and the pro forma answers, may write to the board setting forth their complaints concerning the grades given and ask for a review. Where warranted, a member of the board will review the examination paper, seek comments from other board members and rule on the complaints” (emphasis added). *Davidson, supra*, at 421.

*Application of Peterson*, 459 P. 2d 703 (Alaska 1969), which was considered but not cited in the opinion below involved a candidate for the bar who had been previously admitted in two other jurisdictions. After allegedly failing two successive bar examinations in Alaska, and having been denied meaningful review by the Board of Governors of the Alaska Bar Association, Peterson applied directly to the state Supreme Court to have that body “affirm on the merits” his examination papers and order his admission. While refusing to summarily admit Peterson the court concluded that the record demonstrated the denial of a fair hearing by the Board. The court then declined to reach the due process issue also advanced by appellant but rather relied on its inherent powers pertaining to admissions procedures. On remand the hearing which the court ordered given to Peterson was consistent in all respects with the hearing requested by petitioner in Massachusetts.

*In re Monaghan*, 225 A. 2d 387 (Vt. 1967), which was cited in the opinion below, was a per curiam opinion of the Vermont Supreme Court wherein it refused to “embark on an investigation to ascertain the probity of [bar examination] results certified to the Court in the absence of clear and unequivocal allegations of probative facts to establish imposition, discrimination and manifest unfairness.” This result is readily distinguishable from that which petitioner herein seeks to review.

Using statistics furnished by the NCBE in conjunction with test result information released by the Board through the local newspapers, petitioner in his brief proved the following facts with statistical accuracy. That among the 497 Massachusetts applicants who took the examination in question petitioner scored higher on the MBE than 333. It was further shown that petitioner’s MBE score was higher than 46.7% of the 308 candidates admitted in Massachusetts from the February, 1976 bar examination.

The court apparently felt this created no cognizable inference of error despite the admission by the Board that the correlation between MBE and essay score is generally “surprisingly close.” It is contended that the refusal to order the Board to review petitioner’s essay scores in the face of these and other facts, is, in the words of *Monaghan, supra*, at 387, “manifest unfairness.”

*Petition of DeOrsey*, 112 R.I. 536, 312 A. 2d 720 (1973), also cited by the Court is a thoughtful, thorough, well written opinion of the Rhode Island Supreme Court. In concluding that the evidence presented by the three consolidated petitions was insufficient to require a finding that the Board had been devious, capricious or unfair, the court noted that extensive reevaluation had been done in relation to allegedly failing papers. In that situation,



as a result of such discretionary ad hoc review, seven out of the 20 applicants originally graded as failing were admitted. The Rhode Island Board's review considered *all* the facts, was thorough and fair.

IV THE ADMINISTRATIVE BURDEN ARGUMENT ADVANCED IN THE OPINION ILL SERVES BOTH THE APPLICANT AND THE PUBLIC. THE COURT BELOW HAS IGNORED THE OBVIOUS AND MISSTATED THE FACTS. THE DECISION CREATES A *De Facto* STATE OF LAW THAT IS INIMICAL TO BOTH DUE PROCESS AND EQUAL PROTECTION RIGHTS OF FUTURE APPLICANTS.

It is true that the Board cited administrative burden, budget and time considerations during oral argument and the court takes note of this in its opinion. However, as petitioner pointed out at oral argument, Massachusetts' \$35.00 fee for taking the bar examination is the most insignificant of all the expenditures incurred by any candidate in training for and seeking admission to the bar. Candidates are entitled to be examined carefully and reviewed properly. In developing the MBE, the NCBE is attempting to meet the comments of Chief Justice Warren Burger quoted in 43 *The Bar Examiner* 72 (1974).

"The licensing and admission power over lawyers vested in each of the 50 State jurisdictions, the 93 Federal districts, 13 circuits, has led to a hodgepodge of standards for admission and regulations that are desperately in need of careful re-examination."

The obvious solution to the alleged administrative burden is to either raise the cost of the examination and/or to have an extra fee for those applicants who request review. This approach, which was advanced to the court

below, is far more consistent, reasonable, economical and fair in protecting a candidate's due process rights. Under such conditions appeal would seldom if ever be necessary and the prodigious drain of court resources, time and personal funds reflected in the plethora of cases in this area of law would virtually disappear.

The opinion states that petitioner does not allege prejudice or discrimination on the part of the Board, i.e., that the examiners did not "treat him differently" from others. While it is true that petitioner has eschewed all bias, discrimination, malice or notion that he was "singled out," it does not follow that he was not "treated differently." Since petitioner apparently is the only one heard to complain, it is reasonable to assume that all others concluded they were treated fairly in that their papers were graded accurately and/or consistently. Petitioner has established a *prima facie* case to the contrary. In this most fundamental and vital respect, i.e., grading, he has indeed been "treated differently." A lack of malice is simply not relevant. Even if this distinction could not be found, to state that petitioner was treated the same as others does not provide a basis for treating him unfairly in denying him due process where review is sought and properly supported by factual argument.

Finally, the court fallaciously stated one of petitioner's arguments in its opinion at 601, Appendix p. 22:

"One of his principal contentions is that the board was somehow in error in giving equal weight to the MBE and essay portions."

This statement is without any basis whatsoever from petitioner's briefs or oral argument and upon review is inflammatory and prejudicial.



Another specious statement appears in the opinion at 600, Appendix p. 21:

"The essay examinations of seventeen applicants whose combined scores were higher than Mead's, but still below forty-eight, were not reread."

The Board as previously noted, had conceded in its brief that generally the correlation between MBE and essay scores was "surprisingly close," adding that "individual aberrations were not uncommon." In doing this the Board supplied the data set out above. Both in his reply brief and again at oral argument, petitioner inquired if the seventeen individuals referred to were unreviewed aberrations, or were they seventeen individuals whose MBE and essay scores were both marginally close. Perhaps they were seventeen individuals whose essay scores were high and whose MBE was low. The Board did not see fit to reply nor the court to inquire. It is simply unconscionable for the Massachusetts Supreme Judicial Court to have adopted this unexplained, and properly challenged fact as a partial basis for its decision. That court has joined the Board in refusing to even consider, *or to care*, if the aberration in this instance was in the subjective grading of petitioner's essays in the face of a preponderance of evidence that such was the case.

The net effect of the decision as it stands is that the discretionary power of the Board to make and apply rules has been sustained, but at the same time the Board is held to be without authority, *or responsibility*, to review contradictory results in the interest of fairness, justice and/or the protection of the public. Such discretionary power is readily sustainable as a matter of due process and would not violate the equal protection clause or in any way discriminate against other applicants. Rules are ob-

viously necessary and appropriate, but *over-all fairness* must be the paramount rule that governs the actions of the Board toward *all* candidates. Such protection must be guaranteed to future candidates.

### Conclusion.

That the decision complained of has denied to petitioner due process of law and prevented him from obtaining the license required to practice his profession. The failure of Massachusetts to modify the standard of review applied to applicant's examinations *since adopting* the MBE as an integral part of the bar examination in 1974 is a *grave* injustice to both applicants and the public. A writ of certiorari must issue if a *de facto* state of law in this area of vital interest to the public and the profession is to be avoided.

Respectfully submitted,

CHARLES BERNARD MEAD,  
PRO SE

Box 369

Ashland, New Hampshire 03217.  
(603) 968-4458

**Appendix A.****COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, SS. SUPREME JUDICIAL COURT**  
**No. 76-221 Civil**

**CHARLES BERNARD MEAD, PETITIONER**

**JUDGMENT**

This action came on for hearing before the Court, Braucher, J. presiding, and the issues having been duly heard,

It is ORDERED AND ADJUDGED,

that the following entry of Judgment be, and the same is hereby made:

“Petition denied”

Dated at Boston, Massachusetts this fourth day of August, 1976.

/s/ Joseph A. Ligotti  
Assistant Clerk of Court

## Appendix B.

CHARLES BERNARD MEAD, petitioner.

Suffolk. February 9, 1977. — March 18, 1977.

Present: Hennessey, C.J., Kaplan, Wilkins, Liacos, & Abrams, JJ.

*State Administrative Procedure Act. Due Process of Law, Right to hearing. Bar Examiners. Words, "Agency."*

*Civil action commenced in the Supreme Judicial Court for the county of Suffolk on July 8, 1976.*

The case was heard by *Braucher, J.*

*Charles Bernard Mead, pro se.*

*Frederic S. O'Brien for the Board of Bar Examiners.*

HENNESSEY, C.J. The petitioner, Charles Bernard Mead (Mead), took the Massachusetts bar examination in February, 1976. He failed. His action in the Supreme Judicial Court for the county of Suffolk prayed that the Board of Bar Examiners (board) be ordered to re-evaluate the essay portion of his examination. He also filed a motion that the board be ordered to produce various materials which would enable Mead to "prove statistically" that his low score on the essay portion was inconsistent with the "very high score" he obtained in the Multistate Bar Examination (MBE) portion of the February, 1976, examination.

A single justice of this court, after hearing, dismissed the action, and Mead appealed.<sup>1</sup> There was no error.

The single justice made no findings of fact. If we accept as evidence the assertions and representations contained in

<sup>1</sup> The board appeared before this court by its chairman, Mr. Frederic S. O'Brien. Mead appeared pro se.

a number of documents proffered by Mead, the facts are as follows.

In February, 1976, the board administered its examination to 497 applicants. Of that number, 308 passed the examination. The first day of the examination was the MBE which consisted of 200 questions for each of which four answers were supplied. An applicant received credit if he selected the best of the four answers. The second day of the examination called for essay answers to ten hypothetical fact patterns.

The MBE was scored by machine. The essay examination was graded by readers selected by board members and by board members themselves. Each applicant's raw MBE score was combined with his essay score by the equi-percentile method. This is a recognized statistical procedure which gave equal weight to each section of the examination to obtain the final score. If an applicant's combined score was between forty-eight and fifty, one or more of the board members reread his essay examination.

Mead's combined score was 47.4 and his essay examination was not reread. The essay examinations of seventeen applicants whose combined scores were higher than Mead's, but still below forty-eight, were not reread.

A Massachusetts attorney who does specialized educational work related to bar examinations read Mead's essay examination paper, "marked [it] *hard*," and opined that the grade should have been high enough to bring Mead's average score, MBE and essay combined, well over the passing grade of fifty. A second Massachusetts attorney apparently reached a similar opinion.

Mead's discovery motion sought, inter alia, from the board, an adequate sampling of both passing and failing examination papers. We infer that the single justice impliedly denied this motion, in dismissing Mead's action.



Mead contends that the State Administrative Procedure Act, G. L. c. 30A, is applicable. However, by § 1 of that chapter, the board, as an arm of the judicial department, is excluded from the definition of "Agency" and is thus not subject to the procedure of c. 30A.

Mead also contends that the examining and grading process of the board is arbitrary and capricious. Before the single justice he offered only bald conclusory language in support of this claim. One of his principal contentions is that the board was somehow in error in giving equal weight to the MBE and essay portions. Again, Mead offers little more than his own conclusions. We do not believe that any evidence could be offered which would establish that the equal weighing by the board of the two methods of examination constituted an abuse of the broad discretion of the board.

Mead also argues correctly that he is entitled to due process of law in the testing of his qualifications. The issue is what procedures qualify as due process. There is no support for Mead's apparent proposition that he is entitled as of right to a rereading of his paper. It is true that Mead failed by only a fraction of a point to reach the grade score which would have entitled him to have his paper reread under the board's rules. However, it is also true that the board provided a rereading for any apparently failing applicant who scored within two full points below the passing grade. These are reasonable provisions in light of the fact that hundreds of candidates take the examinations at each offering, twice a year. Cf. *Pettit v. Gingerich*, F. Supp. (D. Md. 1977).<sup>a</sup>

Nor is Mead entitled, in an attempt to show that his examination was wrongly graded, to the due process provided by an adversary hearing with the right to introduce

<sup>a</sup> 45 U.S.L.W. 2421 (D. Md. Feb. 22, 1977).

evidence before an impartial fact-finder. Mead cites no convincing authority for such a contention. Professor Davis, in stating that reexamination is a speedier and more accurate way to provide due process for applicants who fail, writes, "Bar examiners determine questions of fact — qualifications of applicants — by written examinations, but examiners' conclusions are almost never challenged." 1 K.C. Davis, *Administrative Law* § 7.09 (1958). Courts have consistently refused to regrade examinations, usually on the premise that the right of reexamination is a sufficient guarantee of fairness.<sup>2</sup> Massachusetts provides an unqualified right of reexamination.

Mead relies on *Marmer v. Board of Registration of Chiropractors*, 358 Mass. 13 (1970), as entitling him to a hearing. That case is not apposite here. Mead does not allege, as did Marmer, that the examiners treated him differently from others. Indeed, Mead disclaims any assertion of partiality, prejudice or discrimination against him on the part of the board. Presumably the single justice relied on the absence of any such allegation in dismissing the action. Additionally, it seems clear that the single justice concluded that Mead was not entitled to proceed to an evidentiary hearing based on his limited contentions and supporting documents. We agree. We conclude also that Mead has failed to show any unfairness in the board's methods or rules which might impel us to grant relief to Mead under

<sup>2</sup> See, e.g., *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), cert. denied, 426 U.S. 940 (1976); *Whitfield v. Illinois Bd. of Law Examiners*, 504 F.2d 474 (7th Cir. 1974); *Feldman v. State Bd. of Law Examiners*, 438 F.2d 699 (8th Cir. 1971); *Chaney v. State Bar of Cal.*, 386 F.2d 962 (9th Cir. 1967), cert. denied, 390 U.S. 1011 (1968); *Staley v. State Bar of Cal.*, 17 Cal. 2d 119 (1941); *In re Chachas*, 78 Nev. 102 (1962); *In re Wayland*, 510 P.2d 1385 (Okla. 1971); *In re DeOrsey*, 112 R.I. 536 (1973); *In re Monaghan*, 126 Vt. 193 (1967).

our supervisory power over the board in its direction of bar examinations.

*Judgment affirmed.*

---

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

At Boston, March 28, 1977.

IN THE CASE OF SJC-761

CHARLES BERNARD MEAD, petitioner

pending in the Supreme Judicial  
Court for the County of Suffolk No. 76-221 CIV.

ORDERED, that the following entry be made in the docket;  
viz.,—

Judgment affirmed.

BY THE COURT,  
/s/ Frederick J. Quinlan, CLERK.

March 28, 1977

Appendix C.

SUPREME JUDICIAL COURT  
FOR THE COMMONWEALTH

COURT HOUSE

BOSTON

FREDERICK J. QUINLAN

CLERK

WILLIAM M. CLORAN

ASSISTANT CLERK

April 27, 1977

Mr. Charles B. Mead  
P. O. Box. 369  
Ashland, New Hampshire 03217

Dear Mr. Mead:

*Re: Charles Bernard Mead, Petitioner  
Supreme Judicial Court No. SJC-761*

Your request for a rehearing in re the above captioned case has been considered by the court and is denied.

Sincerely yours,  
/s/ Frederick J. Quinlan  
Clerk

c.c.: Frederic S. O'Brien, Chairman  
Board of Bar Examiners  
77 Franklin St., Boston 02110

**Appendix D.**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
No. 76-221 Civil

CHARLES BERNARD MEAD,

Petitioner

*JUDGMENT*

This matter came before the Court, Wilkins, J. presiding, on the Motion for Entry of Judgment in accordance with the rescript entered on April 28, 1977, and thereupon,

It is ORDERED and ADJUDGED,

that the following entry of Judgment be, and the same is hereby, made:

“Judgment affirmed.”

Dated at Boston, Massachusetts, this eleventh day of May 1977.

/s/ John E. Powers  
Clerk of Court